United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7646

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75-7368, 75-6132, 75-6140

GEORGE RIOS, *et al.*,
Plaintiffs-Appellants,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., *et al.*,
Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., *et al.*,
Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS GEORGE RIOS, *ET AL.*

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II. STATEMENT OF THE CASE

A. Preliminary Statement

Plaintiffs-appellants George Rios, Eugene Jenkins, Eric Lewis and Wylie Rutledge and the members of the classes they represent (hereafter "the Rios plaintiffs") appeal from an Order (Appendix at 777)[1] entered on October 17, 1975, which denied back pay to various categories of persons within the plaintiff classes and awarded back pay with certain restrictions to others. An Opinion on back pay was rendered by the Honorable Dudley B. Bonsal, United States District Court of the Southern District of New York, on June 27, 1975, which is reported at 400 F.Supp. 988 (A-768, et seq.). The issue of back pay had been specifically reserved for subsequent decision in the district court's Order and Judgment entered on June 21, 1973 (A-566, et seq.) along with an Opinion (A-580, et seq.) (hereafter "Trial Opinion") which contained the Court's findings of racial discrimination against plaintiffs in violation of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (hereafter "Title VII"), and which ordered affirmative relief.

B. Prior Proceedings

On February 26, 1971, the Rios plaintiffs filed a complaint on behalf of themselves and all others similarly situated in the United States District Court for the Southern

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1. Hereafter citations to the Appendix will be in the form "A- ".

District of New York (hereafter, the "Rios case") alleging employment discrimination by defendants Enterprise Association Steamfitters Local 638 of the U.A. (hereafter the "Union"), the Mechanical Contractors Association of New York, Inc. (hereafter "MCA") and the Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Educational Fund (hereafter "JAC") in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., and other provisions of federal law.

Preliminary relief was ordered on April 16, 1971 (see Opinion and Order of United States District Judge Marvin E. Frankel [A-79-95, 105-06]) and on August 24, 1971, an order was entered by United States District Judge Charles H. Tenney allowing the Rios case to proceed as a class action.

On June 29, 1971, the United States of America filed suit (71 Civ. 2877) (hereafter the "United States case") against a number of New York City construction unions, apprenticeship committees and employer associations, including the defendants in the Rios case. On January 3, 1972, United States District Judge Dudley B. Bonsal entered Findings of Fact, Conclusions of Law and an Order granting preliminary relief in the United States case by requiring the admission of 169 nonwhites to the Steamfitters' Union (the Order appears at A-142 et seq.; the Findings and Conclusions appear at A-157 et seq.).

Thereafter, the United States case against the Union, MCA and JAC was severed from the United States case against

the other defendants and the Rios case and the United States case were assigned to Judge Bonsal and consolidated for trial (A-165). Trial was held before Judge Bonsal from January 15 through January 26, 1973. On June 21, 1973, Judge Bonsal entered an Opinion (A-580 et seq.) and an Order and Judgment (A-566 et seq.) prohibiting further discrimination by the three defendants and requiring affirmative relief to correct the effects of past discrimination. The findings of discrimination and relief were affirmed on appeal by this Court, see, Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974). An appeal taken by the Union from an Affirmative Action Plan adopted by the district court (Index to Record on Appeal, Document 73)[2] was stayed pending the resolution of other issues.

Following the entry of the district court's order on back pay, appeals were filed by the Rios plaintiffs on November 17, 1975 and by plaintiff EEOC on December 9, 1975 with cross-appeals respectively being filed on November 28, 1975 and December 17, 1975 by defendant Union.

After a pre-argument conference at which the issue

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2. Hereafter references to documents assigned a document number in the Index to the Record on Appeal in the Rios case will be in the form "Doc. ___." References to documents assigned a document number in the Index to the Record on Appeal in the United States case will be in the form "2877 Doc. ___." References to Exhibits admitted in evidence in the District Court will be in the form "Ex. ___."

of the order's finality was raised by defendants, plaintiffs filed a motion asking this Court to grant the district court permission to entertain a motion for nunc pro tunc certification of the order here on appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, or in the alternative, for certification of the order pursuant to 28 U.S.C. Section 1292(b). Permission was granted and on February 23, 1976 the district court granted plaintiffs-appellants motion for certification pursuant to 28 U.S.C. §1292(b). As this court ordered the parties to adhere to the original briefing schedule pending disposition of appellant's application pursuant to Rule 54(b) or 28 U.S.C. §1292(b), this brief has been filed simultaneously with appellants' petition under 28 U.S.C. §1292(b).

C. Statement of the Facts

1. In General

The facts developed at the trial and in other proceedings in the court below demonstrated a flagrant pattern of racial discrimination in the steamfitting industry. Black and Spanish-surnamed persons were systematically denied access to employment and training in the steamfitting industry during the "boom years" for the construction industry in New York City. As a consequence, while white workers monopolized the opportunity to earn very substantial salaries, non-whites who had the necessary skills or wanted to learn the skills sustained an enormous loss of wages. This occurred because: the Union denied A branch membership to non-whites; MCA and its members joined with the Union in excluding non-whites from steamfitting employment and MCA established and acquiesced in terms and conditions of employment that excluded non-whites from the A branch; and the Union, MCA and JAC established apprenticeship requirements that denied training opportunities to non-whites.

2. Non-White Access to Membership in the A Branch of the Union

The Union is a labor organization that represents its members in establishing the terms and conditions of employment through collective bargaining in the steamfitting industry

in New York City and Nassau and Suffolk counties (A-443; A-586 [Trial Opinion]). Members of the A branch of the Union perform construction steamfitting; members of the B branch perform shop or repair work (A-586 [Trial Opinion]).[3] Membership in the A branch was found to be a substantial aid in obtaining employment in the steamfitting industry (A-588 [Trial Opinion]). Members of the A branch earned $6.65 per hour in 1970,[4] $7.115 per hour in 1971,[5] $8.15 per hour in 1972[6] and $8.81 per hour in January, 1973 at the time of trial.[7] A branch members also receive extensive fringe benefits, including health care, pensions, unemployment benefits and vacations.[8] In 1971 construction steamfitters worked an average of 3.67

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3. Members of the A branch have a higher hourly rate of pay than members of the B branch. Being a member of the A branch is a substantial aid in obtaining a job as a construction steamfitter in the territorial jurisdiction of the Union and is a prerequisite to obtaining job security and preventing early layoffs. Another advantage of A branch membership is the greater opportunity for advancement and for earning overtime pay (A-588 [Trial Opinion]).

4. A-905 [Collective Bargaining Agreement, July 16, 1969-June 30, 1972].

5. Id.

6. A-906, Id.

7. A-942 [Collective Bargaining Agreement, October 2, 1972-June 30, 1975].

8. A-908-10.

hours per week of overtime (A-591 [Trial Opinion]) paid at a rate of $14.13 per hour (double the regular hourly wage) (A-907) During 1971, the year these actions were filed, 1553 steamfitters earned $15,000 or more while 2537 steamfitters earned $10,000 or more (A-477d).[9] In fact the steamfitting industry had been enjoining a boom since World War II (A-294).

The first non-white was not admitted to the A branch until 1967 (A-586-87 [Trial Opinion]). In 1970, the year immediately preceding the filing of the Rios case, there were twenty-one black and Spanish-surnamed workers among the 3827 members of the A branch (A-587 [Trial Opinion]). They constituted 0.55% of the A branch membership. At that time approximately 37.29% of the population of the City of New York was composed of blacks and persons of Spanish language.[10]

Not until after this case was filed did any substantial number of non-whites obtain Union membership, and then it was primarily as a result of the preliminary relief ordered by the courts, (154 ordered admitted in the United States case and three ordered admitted in the Rios case (A-106, 180).

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9. Many of the steamfitters earning less than these amounts were persons working part of the year as a matter of choice (A-310).

10. The district court found on a limited remand of the trial opinion that absent discrimination non-whites would have comprised 26% of the A branch membership. See Rios v. Enterprise Association Local 638 of U.A., 400 F.Supp. 983 (S.D.N.Y. 1975).

Of the non-whites who had been admitted to the A branch at the time of trial, three unidentified non-whites were admitted other than through apprenticeship (through which five persons were admitted) or civil rights proceedings (through which one hundred and eighty-three persons were admitted), including the preliminary injunctions in the Rios and United States cases.[11] Thus, eight non-whites, at most, were admitted without resort to government compulsion. Five of these were admitted because they completed the arduous

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11. As of 1972, 191 non-whites were members of the A branch (A-587 [Trial Opinion]). Of these, 157 were admitted under preliminary injunctions below (154 in the United States case, 3 in the Rios case) and six were admitted pursuant to agreement of the parties in the United States case (A-106, 179-80). The names of twenty-five persons admitted to the A branch as journeymen before the Rios case was filed were entered in evidence at the trial (A-472-4). To arrive at the correct number of journeymen, the thirteen apprentices on the list must be substracted. Leon F. Tober, who was expelled from the apprenticeship program, must also be removed from the list. Mr. Tober's name appears on the list of "Apprenticeship Cancellations" submitted by the Union (A-898). Mr. Tober's name is misspelled "Taher" at A-473. Of the remaining twenty-five, twenty were admitted as the result of civil rights proceedings (compare the names set out at A-472-4 with the names set out in correspondence relating to New York City Commission on Human Rights proceedings at A-405-7 and see testimony of two of the individuals involved in those proceedings at A-302-4, 306-7). The remaining five were admitted through apprenticeship (compare the names set out at A-472-3 with the names set out in the 1964 list of apprentices at A-409-11). This accounts for 188 (157 [Preliminary Injunctions] + 6 [agreement of parties in the United States case] + 20 [earlier civil rights proceedings] + 5 [completed apprenticeship]) of the 191 non-white members in 1972. It does not account for three unidentified persons.

apprenticeship program found to have discriminatory admission requirements and reduced in length by the district court from five to four years (A-612 [Trial Opinion]). By contrast, 156 whites were admitted to the A branch shortly before trial without either completing apprenticeship or taking an examination (A-599 [Trial Opinion]).

Efforts to achieve membership by blacks and Spanish-surnamed persons were repeatedly rebuffed. Some persons applied in writing to the Union and received no response (A-137, 203, 206). Others made oral inquiries and received evasive or negative replies (A-188-89, 853). Still others believing that it would be futile to apply for membership did not even attempt to make a formal application (A-126-27, 136).[12] In contrast to white A branch members, qualified non-white steamfitters were earning $5.00 per hour doing construction work as members of the B branch (A-851) while those working in fabricating shops were earning from $3.60 to 6.20 per hour (A-849-50).[13]

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12. One witness testified that "Everyone that I talk to that I have worked with, none of them seem to be able to get into the A branch. They have been in the steamfitting, some of them much longer that I have" (A-126-27).

13. Compare the hourly wages for A branch members from 1969 to 1972 with those of the B branch working in shops and as service fitters, A-900, 905-06 and 911, 914.

	A Branch	B Branch
1969	$6.31	$4.80
1970	$6.55	$4.20-$5.05
1971	$7.61	$4.55-$5.30
1972	$8.15	$4.90

Fringe benefits were also lower for B branch members (compare A-908-10 with 915-16).

The District Court, on the basis of the facts before it found that the Union had violated Title VII of the Civil Rights Act of 1964 and ordered extensive affirmative relief (A-600-01 [Trial Opinion]), pursuant to which an additional 447 fully qualified non-whites became members of the A branch (A-1206). Most, if not all, of these individuals lost wages as a consequence of the defendants' discriminatory practices.

3. Referral Practices in the Steamfitting Industry

There has been no formal method of referring workers for employment in the steamfitting industry in the New York area (A-602). The Union does not maintain a formal hiring hall (A-602). Information concerning available employment was circulated informally, usually by word of mouth (A-592 [Trial Opinion]).

Foremen and job superintendents,[14] most of whom were white members or former members of the A branch (A-602 [Trial Opinion]), employed steamfitters, using this informal word-of

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14. At the time of trial there were two non-white employers and two non-white foremen in the New York area (A-621 [Trial Opinion]). At the time of trial all of the past and present business agents and officers of the Union were white; all of the past and present officers of the MCA were white, and since its formation all members and employees of the JAC have been white (A-589 [Trial Opinion]).

mouth system, as the need arose (A-591-92 [Trial Opinion]) and recruited their friends, relatives and other workers they knew (A-720; Ex. 170G, p. 9; Ex. 170H, pp. 8-10; 2877 Doc. 8, p. 375). Many A branch members were related to other members (A-587-88 [Trial Opinion]).[15] Being a member of the A branch, or even being a friend or relative of an A branch member, gave a worker access to the job availability information (A-720) and was a substantial aid in obtaining a job as a construction steamfitter within the Union's territorial jurisdiction (A-159, 588). Relatives worked together at the same job site (A-221-25); many of the employed permit men[16] were related to A branch members (Ex. 155, p. 13). Indeed, many relatives of A branch members worked for years as permit men (Ex. 155, p. 14). In contrast, persons who asserted Title VII rights found themselves unable to get work (A-227-29) or subject to early layoffs (A-332-40, 342-45).

The district court found the referral practices in the industry combined with the history of discrimination in admissions to the A branch to preserve the effects of past discrimination by giving whites an advantage in obtaining employment (A-602-03 [Trial Opinion]). Consequently, the court ordered

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15. When the Rios case was filed, at least 11% of the members of the A branch were related by blood or marriage to other members of the A branch (A-602 [Trial Opinion]).

16. A "permit man" is a non-member of the A branch who is given temporary permission by the Union to do A branch work.

the Union and MCA to maintain up-to-date records of available work and unemployed steamfitters (A-603 [Trial Opinion]). In spite of this effort, a recent analysis showed that non-white journeymen constituted 22% of the construction work force but had only 11% of the work (A-1207-08).

4. Achieving A Branch Membership Through the Apprenticeship Program

As noted above, at the time of trial apprenticeship was virtually the sole non-litigious means of access to A branch membership for non-whites, five non-whites having successfully pursued this method of entry.[17] See supra p. 9.

As of July 9, 1971, there were 408 apprentices, of whom 2.94% were black and 0.98% were Spanish-surnamed (A-596 [Trial Opinion]). Since 1964, 492 apprentices have been indentured, of whom 94.3% were white, 4.67% were black and 1.01%

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17. Apprentices were paid a percentage of a journeyman's wages according to the following schedule:

1st year	40% of journeyman wages
2nd year	50% " " "
3rd year	60% " " "
4th year	70% " " "
5th year	85% " " "

and received fringe benefits. The collective bargaining agreement also required contractors to pay apprentices for five of the seven hours of class which apprentices attended once every week (A-593 [Trial Opinion]).

were Spanish-surnamed (A-596 [Trial Opinion]).[18]

The apprenticeship program is operated by the JAC pursuant to a Trust Agreement between the Union and MCA (A-432, et seq.). There are eight trustees under the Trust Agreement, four of whom are appointed by the Union and four of whom are appointed by MCA (A-589 [Trial Opinion]). The trustees have general authority to operate and set the standards for the apprenticeship program (A-434-36) and determine the need for apprentices (A-434). The trustees designated by MCA serve at the will of MCA, which can, at any time, terminate the designation of one of its trustees by a resolution of the MCA Board of Directors (A-433). Union trustees served for a term of three years at which time the Union would designate their successors (A-433). The provisions of the Trust could only be amended by a resolution approving such amendment adopted by the Union at a regular or special meeting and by a similar resolution of the MCA Board of Directors (A-1201).

Since 1964, applicants for apprenticeship have been required to take a written examination (A-594 [Trial Opinion]). Prior to that time, apprentices were selected after a personal interview and there was no formal method of announcing apprenticeship classes (A-593-94 [Trial Opinion]). No non-whites became

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18. Black apprentices testified to discrimination against them by white steamfitters (A-232, 284-85). During the period from 1964 to 1971, 6.7% of the white apprentices left the program, while 25% of non-whites had dropped out (A-597 [Trial Opinion]). This disparity in attrition rates was statistically significant at a very high level (Supp. A-782).

apprentices prior to 1964 (A-594 [Trial Opinion]). The examination results for the year 1964 to the date of trial revealed that, among those tested, 41.37% of the whites, 10.37% of the blacks and 11.1% of the Spanish-surnamed persons achieved passing scores (A-594 [Trial Opinion]). The disparity betwen the pass/fail rates of non-whites and whites had a very high level of statistical significance (A-257-59) and defendants were on notice as to the discriminatory effect of these tests (A-404, A-504-08, 512-13). The tests had not been validated (A-918). The district court found that the defendants had not met their burden of showing the tests to be job-related (A-607 [Trial Opinion]).

Among the ninety-five non-whites who failed the discriminatory apprenticeship tests were two witnesses who testified at the trial. One of these, Jewel Steele, took the apprenticeship test in 1968 (Doc. 52, p. 695). Along with twenty-four of the twenty-five blacks who took the test that year (A-629 [Trial Opinion]), he did not pass. At the time of trial, he was earning $4.29 per hour (A-861), while persons who had passed the test and had been admitted to the apprenticeship program in 1968 were earning $7.49 per hour, plus the fringe benefits to which apprentices are entitled (A-943).[19] Similarly, Paul Bailey, who

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19. According to the terms of the Collective Bargaining Agreement, an apprentice indentured in September, 1968 would have been earning 85% of the journeyman wage of $8.81 (A-942-43).

took and failed the test in that same year, could have been earning $7.49 instead of the $3.17 per hour he was earning at the time of the trial (A-862).

Shortly after the trial, the defendants had a new test administered to apprenticeship applicants, the General Aptitude Test Battery (S-61R) (A-790-91). As this test had not yet been administered at the time of trial, there was no evidence of its effect on non-whites (A-608 [Trial Opinion]). After the test was administered, its discriminatory impact became apparent. Eighty-three per cent of the white applicants who took the exam scored in the "high" category, while only seventy per cent of the black and fifty-five per cent of the Spanish-surnamed applicants scored "high" (A-797-812).[20] This test had not been properly validated at the time of trial (A-262) and still has not. To select apprentices, the test results were combined with an oral interview. The result of the application of both the test and the interview was that only five of the top 100 candidates were non-white (A-792-96). Given the original intent to limit the apprenticeship class of 1973 to 100 persons (A-865-66), the GATB and the oral interview would have been little, if any, better than the earlier tests which had resulted in thirteen non-whites achieving passing

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20. The scores of 20 Oriental and American Indian applicants must first be subtracted from the total non-white and white scores (A-797, 812) the resulting scores of the black and Spanish-surnamed applicants can then be subtracted from and compared with the total white scores (A-797, 812).

scores out of 124 who took the tests. Recognizing the problem with the S-61R and the oral interview, the district court ordered that apprentices be selected from two separate lists, one for whites and one for black and Spanish-surnamed applicants (Doc. 105, p. 66).

5. Employment of Non-Whites

The pattern of excluding non-whites from participation in the construction steamfitting labor force was also reflected in the employment practices of industry contractors. Defendant MCA is a trade association for approximately 60 of the most important of these contractors in the New York area (A-588-89 [Trial Opinion]). MCA acts as an agent for its members in setting the terms and conditions of employment of steamfitters through the negotiation and signing of collective bargaining agreements with the Union (A-588-89, 614 [Trial Opinion]). The court below found that MCA members employed the major share of the steamfitting work force in the Union's jurisdiction, and that the terms of the collective bargaining agreement negotiated between MCA and the Union prevailed throughout the industry (A-614 [Trial Opinion]). MCA members did not employ non-white journeymen until 1966 (A-412), and did so then only as the result of government pressure (A-122). In the words of MCA's Executive Secretary, Mr. Joseph Hopkins, MCA members "share[d] as much as the [Union]," in resisting employment of non-whites, but MCA did not penalize its members for failure to employ non-whites (A-498-99). It was an accepted practice in the industry that MCA members

did not employ those who were not members of the Union or given permits by the Union (A-500-01).

New York City officials repeatedly placed pressure on MCA contractors to employ non-whites (A-122-23, 417-29). But the efforts of at least one major City construction-contracting agency, the New York City Housing and Development Administration, were unsuccessful prior to the filing of the Rios case (A-276).

In April, 1971, four MCA contractors were denied contracts by the New York City Board of Education as a result of Federal Contract Compliance Officer and City HDA Officer (A-280) recommendations for disqualification because of too few non-whites working on job sites (A-417). Only after contract compliance disqualifications were brought against an MCA member contractor were three non-whites hired (A-280). The New York City and federal governments regularly resorted to pressure of this type to secure the employment of non-whites. Contractors were repeatedly urged to hire minorities or lose City contracts (A-274) and repeatedly they referred the Housing and Development Administration of New York City to MCA (A-274, 278-80).

MCA asserted that it responded to these government pressures beginning in 1964 at the apprenticeship level and in 1966 at the journeyman level (A-122). MCA provided letters indicating employment of between 14 and 30 non-white workers

between 1966 and the filing of the Rios case (A-412, 415, 442). Yet, in 1971, there were 5,600 men working as steamfitters within the jurisdiction of the A branch (A-479). In fact the first significant effort to employ non-whites did not occur until after the Rios case was filed when MCA placed some 100 non-whites in the industry (A-123-24).

Eric Lewis, a fully qualified steamfitter, sought employment through MCA but was told he could not have a job unless he completed the apprenticeship program (A-290) found to be discriminatory by the district court (A-604 [Trial Opinion]). In fact less than 25% of the members of the A branch had been through the apprenticeship program (A-593 [Trial Opinion]). He was also told that he would probably not want to join the apprentice program as the wages would be too low for him (A-290;A-93 [Opinion of Frankel, J.]).

III. ARGUMENT

1. The District Court Erred in Denying Back Pay to Persons Who Were Victims of Discrimination in The Steamfitting Industry

Two days prior to the issuance of the District Court's decision on back pay, the Supreme Court decided Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The Supreme Court decision established the standards which must guide the award of back pay in Title VII cases. The grounds of the District Court's denial are in direct conflict with the Supreme Court's ruling.

In Moody the Supreme Court considered a district court's denial of class-wide back pay to remedy discrimination resulting from a seniority system and written employment tests which, though neutral in form, were shown to have a disproportionate and unjustifiable impact on black persons. Back pay had been denied by the district court due to "lack of 'evidence of bad faith non-compliance'" with Title VII, and the belief that the defendant would be prejudiced because the back pay claim had been made late in the litigation and contrary to an earlier representation. 422 U.S. at 410. The Supreme Court held that the denial was in error.

Although the back pay remedy under Title VII is equitable and therefore discretionary, the Supreme Court in Moody emphasized that:

> ". . . Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the 'fashioning [of] the most complete relief possible.'"[21]
>
> 422 U.S. at 421

Assessing the legislative intent, the Court held that back pay must be awarded in accordance with the dual objectives of Title VII -- achieving equality of opportunity by removing discriminatory barriers, and making persons whole for injuries suffered on account of unlawful employment discrimination. Back pay was integrally related to both. First, the "reasonably certain prospect of a back pay award," 422 U.S. at 417, would provide an incentive for self-elimination of legally dubious employment practices, a practical incentive which the prospect of an injunctive order simply did not have. Second, without compensating the victims of discrimination for the economic injuries which they have suffered, it

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21. The Court in Moody also recognized the applicability of the inherent, equitable duty of the courts generally in cases of racial discrimination:

> "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' Louisiana v. United States, 380 U.S. 145, 154."
>
> 422 U.S. at 418

would be impossible to restore them to the "position where they would have been were it not for the unlawful discrimination" 422 U.S. at 421.

Accordingly the Court held that:

> ". . . given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."
> 422 U.S. at 421

A. The District Court Erred in Denying Back Pay to Persons Discriminated Against in the Operation of the Apprenticeship Program on the Ground of Defendants' Good Faith

That the district court totally failed to apply the principles announced in Moody is evident from its denial of back pay to victims of discrimination in the apprenticeship program, which it did on the ground that "the admission tests used by defendants were registered with the United States and New York State Departments of Labor and were adopted by defendants in good faith on the recommendation of experts." (A-770-71 [Opinion]).[22] In Moody the Court explicitly rejected good faith as an adequate basis for denial of back pay:

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22. A second ground given by the district court, that the resulting damage was "speculative," is discussed infra, pp. 28-31.

> "If back pay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.' Griggs v. Duke Power Co., supra, 401 U.S., at 432."
>
> 422 U.S. at 422-23

Moody emphasized that the only immunity based on good faith which Congress had created in Title VII was the complete but very narrow immunity for conduct shown to have been undertaken

> "'in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission.' 42 U.S.C. §2000e-12(b). It is not for the courts to upset this legislative choice to recognize only a narrowly defined 'good faith' defense."
>
> 422 U.S. at 423, n.17

Thus, denial of back pay on the basis of any other supposed good faith defense or immunity is plainly contrary to the law. To hold otherwise, the Supreme Court recognized, would in effect require the worker himself to bear the economic hardship caused by unlawful discrimination and completely fail to ameliorate the injury which the victim of discrimina-

tion had suffered.[23] Accord, Hairston v. McLean Trucking Co., 520 F.2d 226, 231 (4th Cir. 1975); Trans Union (UTU), Local 974 v. Norfolk Western Railway Co., ___ F.2d ___, 10 E.P.D. ¶10,398 p. 5727 (4th Cir. 1975); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364, 1377 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 877 (6th Cir. 1973).

Holding defendants immune from back pay on the basis of "good faith" is not only legally unsound, but contrary to the facts.[24] It is not in dispute that the tests for admittance into the apprenticeship program eliminated disproportionately more black and Spanish-surnamed than white applicants, and defendants were aware of this fact.[25] The

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23. The Court also pointed out that conditioning an award of back pay on defendants' lack of bad faith would create a drastic and categorical distinction between injunctive and back pay relief under Title VII, a distinction rejected both by the language of the statute and by its legislative history. 422 U.S. at 423.

24. In Moody the defendant's good faith rested upon findings that in 1964 the company had begun active recruitment of blacks for its Maintenance Apprenticeship Program, had merged certain lines of progression on its own initiative, and had taken steps to correct other abuses as judicial decisions expanded the interpretations of Title VII. 422 U.S. at 410.

25. The data which demonstrated the disparate impact was provided by JAC itself in response to plaintiffs' interrogatories (Doc. 24, Appendix A). The examination results for the years 1967 to the date of trial revealed that, among those tested, 41.37% of the whites, 10.37% of the blacks and 11.1% of the Spanish-surnamed persons achieved passing scores (A-620 [Trial Opinion]).

disparity between the pass/fail rate of non-whites and whites had a very high level of statistical significance.[26] The tests had not been validated (A-918), and were found by the District Court not to have been properly job-related (A-607 [Trial Opinion]). These same tests had in 1968 been the subject of a letter to the defendants by Dr. Jay Gottesman of defendants' testing agency, which pointed out their likely discriminatory impact and lack of validation (A-404). During the previous year Dr. Dennis Derryck, co-director of the Workers' Defense League, an organization established to increase non-white participation in the New York construction industry, had contacted the defendants on numerous occasions pointing out the discriminatory impact of the apprenticeship tests, their lack of validation and the arbitrariness of the passing score (A-504-08). His efforts were unavailing (A-512-13). Moreover, even while this action was pending, "156 whites were admitted to the A branch without completing the apprenticeship program and without taking either a written or a practical examination, . . ." (A-599 [Trial Opinion]). In light of the above communications, the obvious results of the test, and the application of a special admission standard for whites, it is inconceivable that the continued use of these tests could be considered in "good faith". Indeed, the facts show defendants to have been in bad

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26. (A-256 [Tr. Trans. Testimony of Dr. Richard H. Barrett, plaintiffs' testing expert]).

faith, as described in Moody, and the consequence of their acts in this regard is dictated by the Supreme Court's decision:

> "Where an employer has shown bad faith —by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience."
> 422 U.S. at 422

Defendants' registration of the apprenticeship program with the state and federal departments of labor in no way rehabilitates or immunizes their conduct. In fact, the New York State Bureau of Apprentice Training explicitly informed defendants that "Our registration of your program does not preclude others from filing complaints with the New York State Division of Human Rights alleging that your selection standards are discriminatory in content or in actual application."[27] The registration does not purport to confer any

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27. Defendants JAC Ex. J-X. An earlier, 1966 letter from the State Bureau to the JAC had warned defendants:

> "Procedures in the selection of apprentices are very much in the public eye. With or without justification, your practices may be subject to criticism or challenge. Such challenges, to the degree to which they are not resolved locally, may be carried to the State Commission for Human Rights by parties in interest. To assure non-discrimination in selection will require good faith and vigilance on the part of all concerned." (A-919) (emphasis supplied)

immunity and clearly carries none.[28] Indeed, the communications from the State Bureau put defendants on express notice of the need for good faith and vigilance in the administration of the program, notice which defendants failed to heed even when informed by their own expert in 1968 of the admission test's likely disparate impact and lack of validation.

Defendants' claims of good faith are legally insufficient to justify denial of back pay to the victims of their discriminatory practices. Indeed, Moody dictates that, having opted to maintain practices which they knew to be, at best, of "highly questionable legality," defendants "can make no claims whatsoever on the Chancellor's conscience." 422 U.S. at 422.

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28. United States v. United States Steel Co., 520 F.2d 1043, 1058-59 (5th Cir. 1975) rejected as a defense to back pay liability the Union's contention that any discrimination for which it was responsible was the result of good faith efforts to comply with the law undertaken in reliance on earlier lower court and administrative decisions. The Court pointed out that the defendants had been on notice since the effective date of Title VII that employment discrimination based on race was illegal.

B. The District Court Erred in Denying Victims of Proven Discriminatory Practices An Opportunity to Prove Their Entitlement to Back Pay

This section will discuss grounds of the district court's denial of back pay which, although stated variously in regard to three categories of plaintiffs, amount to essentially the same legal error.

As to victims of discrimination in the apprenticeship program, the lower court denied back pay on the additional ground that the resulting damages were "speculative." Victims of the discriminatory job referral practices were denied the relief on the sole ground that the resulting damages were "not ascertainable since Local 638 had no hiring hall and there are no accurate records of job openings for the period involved". Victims of discrimination in admission to journeyman membership in the A branch of the union who did not make formal written application to the A branch were denied the relief on the sole ground that their damages were "hypothetical" (A-770 [Opinion]).

The effect of the lower court's ruling is a blanket denial of opportunity to prove the losses which the victims of discrimination have suffered. Although the court found illegal discrimination in each of areas concerned sufficient to justify extensive affirmative relief, the victims of those practices have been left to bear the losses. In United States v. United States Steel Corporation, 520 F.2d 1043, 1053 (5th Cir. 1975), a court of appeals recently reversed the decision of a district

court which, after finding a pattern and practice of racial discrimination, did not afford certain classes of non-whites an opportunity, "one by one, to present personal claims for back pay." Plaintiffs submit that the victims of the discrimination found by the court in this case are entitled to a similar opportunity.

The lower court's disposition obviously ignores the "make whole" purpose of Title VII so recently reaffirmed by the Supreme Court in Albemarle Paper Co. v. Moody, supra, and weakens the incentive towards self-elimination of discriminatory practices. If the lower court's reasons for denial of relief were "applied generally," there can be no doubt that the result would "frustrate the central statutory purposes" of Title VII. 422 U.S. at 421. As the Court of Appeals for the Fourth Circuit has observed and held in Hairston v. McLean Trucking Co., 520 F.2d 226, 232-33 (4th Cir. 1975):

> "[W]e reject the notion that an employer who has practiced racial discrimination in employment may avoid redressing the wrong inflicted on the ground that the resulting injury is not capable of precise measurement. Class actions for back pay under Title VII are inherently complex; the computation of individual awards necessarily involves speculation: what the plaintiffs would have received but for discrimination. Moreover, as grosser forms of discrimination give way to more subtle ones, even greater complexity is introduced into the hypothetical inquiry. But Title VII condemns subtle as well as gross discrimination, and our duty to redress all forms of discrimination is clear."

With this recognition the court in Hairston, 520 F.2d at 233, vacated and remanded the district court's decision, reiterating the dual principles which have properly guided the courts in back pay determinations. As succinctly stated by the Fifth Circuit in Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-61 (5th Cir. 1974):

> "[I]n computing a back pay award two principles are lucid: (1) unrealistic exactitude is not required [footnote citations omitted], (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer." [footnote citations omitted]

See, Meadows v. Ford Motor Co., 510 F.2d 939, 948 (6th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3594 (U.S. April 25, 1975) (No. 74-1349).

There is no basis for failure to follow the principles in this action once the district court's decision is reversed and the members of the class are afforded an opportunity to prove their claims. As to the apprenticeship program, the JAC has a record of all persons who applied and the results obtained by those who took the written tests (Doc. 24, Appendix A). The district court's decision, to the extent that it affords an opportunity to some journeyman members of the class to prove their back pay claims, properly contemplates that monetary losses be computed on the basis of the average wages of white members of the A branch during the relevant period (A-775 [Opinion]). There is no reason to distinguish the situation of non-whites

who were discriminatorily denied apprenticeship or indentured apprentices who lost wages as a result of illegal employment discrimination from the situation of non-white journeymen who lost wages for the same reason. See Pettway v. American Cast Iron Pipe Company, 494 F.2d 211, 258-59 (5th Cir. 1974) (persons denied admission to apprenticeship program eligible for back pay).

There is similarly no reason to deny victims of discriminatory referral practices an opportunity to prove their claims. The district court characterized the losses suffered by these members of the plaintiff class as "not ascertainable" since the union did not operate a hiring hall and there were no accurate records of job openings for the period involved (A-770 [Opinion]). The effect of the court's rationale is to reward defendants for failing to keep records of their own discrimination. Victims of the unlawful practices should be permitted to prove their claims through their own records, testimony or other evidence.

A similar opportunity must be afforded to qualified non-white journeymen who did not make formal, written application for A branch membership. The district court characterized their losses as "hypothetical" (A-770 [Opinion]). However, testimony was presented at the trial which showed that some non-whites made oral inquiries regarding membership and were rebuffed by defendants (A-188-89, 853). Clearly their injury

is no less real because they did not commit their request to writing. Nor should the Union gain from the fact that it discouraged non-whites from making formal application.

Others did not apply because they believed, based on their knowledge of the racial composition of the A branch and the failure of other non-white applicants to be admitted, that it would be futile to do so (A-126-27, 136). Whether a person actually applied to the Union may be relevant for purposes of back pay, but it should not be dispositive. Denying back pay to those who were deterred from applying because of the discriminatory reputation and actions of the defendants would frustrate the "central statutory purposes" of Title VII. As was recently pointed out by the Fourth Circuit,

> "[i]f an employer can avoid back pay liability through a policy which makes an attempt to gain a better job risky or futile, then this subtle form of discrimination is encouraged, not discouraged. Similarly, plaintiffs harmed by such policies--plaintiffs deterred by the futility or risk of seeking promotion--are denied an award which would 'make them whole,' not because they were not disadvantaged by discrimination, but merely because of the peculiar method by which discrimination was implemented." Hairston v. McLean Trucking Co., 520 F.2d 226, 232 (4th Cir. 1975).

Accord, Head v. Timken Roller Bearing Co., 486 F.2d 870, 878 (6th Cir. 1973).

The district court erred in rejecting testimonial

evidence as a means of proving back pay cliams where no written record existed. Testimonial evidence was indispensable in proving the case of discrimination and should likewise be considered probative in back pay proceedings. There is no reason for establishing one standard of proof for injunctive relief and another standard for back pay. The Supreme Court in Moody explicitly stated that:

> "There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies."
>
> 422 U.S. at 423

The lack of a written application or other written record in the union's possession should not be a bar to back pay entitlement. The district court found that there was a pattern of racial discrimination in referrals to work and admission to the A branch (A-600-03 [Trial Opinion]). Claimants should therefore be permitted to present their individual claims for back pay with whatever supportive evidence they have, whether it be in the form of records of non-white referral groups, their own personal records, or testimonial evidence.

The discriminatory features of the industry have been enjoined; the victims must also be made whole. Those persons are clearly entitled to an opportunity, "one by one, to present personal claims for back pay." United States v. United States Steel Corporation, supra, 520 F.2d at 1053. Indeed, without such an opportunity, it is only "speculative" to assume that their claims could not be made out.

2. All Defendants Are Liable for the Discriminatory Practices in the Industry

A. MCA is Liable for Back Pay to Those Denied Employment as Journeymen in the Steamfitting Industry

In its opinion on the merits, the District Court found that all present and past officers of MCA were white (A-589 [Trial Opinion]); that employers sought workers through MCA (A-592 [Trial Opinion]); that while there was "no evidence that either Local 638 or MCA. . .engaged in purposeful discrimination. . ." the informal referral system and the history of discrimination in admission to the A branch gave ". . .whites an advantage in obtaining employment" (A-602-3 [Trial Opinion]). The court also found that, although no specific instances of MCA discrimination were shown, MCA has greater influence over and responsibility for employment practices in the industry than any employer and that plaintiffs had shown an absence of non-white employment in the industry generally requiring a change in MCA referral practices (A-616 [Trial Opinion]). On the basis of these findings, the court enjoined MCA from further discrimination (A-567); required MCA to maintain up to date records of available work (A-603); ordered MCA to submit an affirmative action program (A-569); required all defendants, including MCA, to use their best efforts to provide apprentices with 1750 hours of work per year (A-575); and ordered MCA to use its best efforts to maintain

an employment register (A-576). In its affirmative action program the court further ordered MCA to refrain from causing those who applied for A branch membership under its decree to suffer loss of employment or status as a consequence of failure to pass the practical examination established by the court (Doc. 73 p. 7), and required the Union and the "employers" to use their best efforts to place non-whites who failed that practical examination in training programs (Doc. 73 p. 9).

This relief against MCA could not have been ordered absent a finding of discrimination by MCA, purposeful or otherwise. While MCA's participation and acquiescence in the general industry practices is all that is required to establish MCA liability for back pay, there is certainly ample evidence in the record to support even a finding of purposeful discrimination.

MCA members did not hire non-white journeymen until 1966 (A-412), and only then because of government pressure (A-122). In the words of MCA's Executive Secretary, MCA members "share[d] as much as the [Union]" in the industry's discriminatory practices, because they resisted employment of non-whites and MCA did not penalize its members for failure to employ non-whites (A-498-99). MCA placed, at most, 30 non-whites between 1966 and 1971, the year of the filing of the Rios case, (A-412, 415, 442), a year in which 5600 men were working in the industry (A-479).

MCA acts as an agent for its members in negotiating the terms and conditions of employment which prevail throughout the industry (A-614 [Trial Opinion]) and negotiates and signs the collective bargaining agreement on behalf of its members (A-589 [Trial Opinion]). According to the terms of the Collective Bargaining Agreements negotiated between MCA and the Union, the Union was to

> "furnish to the members of the Contractors' Association all the competent steamfitters and apprentices which they demand through the Contractors' Association, and that in consideration thereof the members of the Contractors' Association will, in the employment of steamfitters and apprentices, observe the Rules of the [Union]"; (A-444).

It was an "accepted practice" in the industry that MCA members did not employ workers who were not members of, or given permits by, the Union (A-500-01). MCA necessarily participated actively in this practice.

City officials repeatedly and unsuccessfully tried to place non-white workers with MCA contractors through MCA (A-276, 496-97). And Eric Lewis, a wualified non-white steamfitter, sought employment through MCA but was told he could not have a job unless he completed the apprenticeship program. He was also told that he would probably not want to be an apprentice because the wages were so low (A-290; A-93 [Opinion granting preliminary relief in the Rios case]). Moreover, MCA was responsible for, and directly involved in the discriminatory practices of the JAC (see infra, pp. 39-42), a fact which also exposes

MCA to back pay liability to journeymen since apprenticeship, which was itself discriminatory, was virtually the sole non-litigious route to journeyman status for non-whites, while whites were given direct access to A branch membership.[29]

Thus it is evident that MCA was an active participant in the discriminatory practices in the industry. Even if MCA had merely acquiesced in the discriminatory acts of the Union, however, it would be liable for its passive participation. Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, 491 F.2d 1364, 1381-82 (5th Cir. 1974); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973); cf. Robinson v. Lorillard, 444 F.2d 791, 799 (4th Cir. 1971) (company's liability not mitigated by the fact that it may have been subject to pressure from the Union).

Back pay cases decided under the National Labor Relations Act provide useful guidance in determining the liability of MCA under Title VII. See Albemarle Paper Co. v. Moody, supra, 422 U.S. at 419-420, 422, n.16. That Act has been held repeatedly to impose back pay liability on an employers' association in situations strikingly similar to the instant one. See NLRB v. E.F. Shuck Construction Co., 243 F.2d 519 (9th Cir. 1957); NLRB v. Waterfront Employers of Washington, 211 F.2d 946 (9th Cir. 1954); cf. NLRB v. Southwestern Colorado Contractors Association, 379 F.2d 360 (10th Cir. 1967).

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29. See infra section 2.B for a discussion of MCA liability for the back pay entitlement of persons denied apprenticeship status or Union membership resulting from the discriminatory operation of the apprenticeship program.

In Shuck the contractors' association, like MCA, had negotiated a collective bargaining agreement that, in effect, extended an employment preference to union members. Shuck, supra at 520. In response to a union refusal to admit an employee to membership an employer member of the association discharged the employee. Shuck, supra at 521. The association was held liable for back pay. Shuck, supra at 522-23.

The situation here is similar. MCA negotiated the collective bargaining agreement that allowed the Union to provide MCA with steamfitters. See supra p. 36. Union members had an advantage in obtaining employment (A-588 [Trial Opinion]) and MCA's Executive Secretary admitted that it was an accepted practice to hire only Union members or permit men (A-501). Since Union membership was denied non-whites, they did not reap the benefits of the employment advantage accorded members. This resulted in a violation of Title VII. MCA should bear the financial cost of that violation just as the contractors' association in Shuck did. Since employers' associations such as MCA are employers within the meaning of Title VII (A-612 et seq. [Trial Opinion]), see Williams v. New Orleans Steamship Association, 341 F.Supp. 613 (S.D. La. 1972), and since MCA violated Title VII (see supra pp. 35-37), MCA is liable for back pay accruing as a consequence of its violation of Title VII.

B. All Defendants Are Liable for Back Pay for Discrimination Against Non-Whites in the Operation of the Apprenticeship Program

The district court found that the apprenticeship program administered by the Joint Steamfitting Apprenticeship Committee of the Steamfitters' Industry Educational Fund violated Title VII (A-604 [Trial Opinion]) and accordingly ordered broad injunctive and affirmative relief (A-567-68, 570-71 [Trial Order]). As the reasons given by the district court for denying back pay have been shown to be erroneous, see supra pp. 20-31, the JAC should be held liable for back pay to persons against whom it has discriminated.

Moreover, MCA and the Union are responsible for the discriminatory acts of the Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Educational Fund, and consequently for its back pay liability. The district court found that the Steamfitters Industry Educational Fund was created pursuant to a Trust Agreement with a Board of Trustees, four of whom were chosen by the Union and four of whom were chosen by MCA (A-589 [Trial Opinion]). The court further found that these trustees appointed the JAC, a joint labor-management committee of eight members which administered the industry's apprenticeship program (A-589, 614 [Trial Opinion]). The JAC is thereby controlled by the MCA and the Union through the operation of the

Steamfitters Industry Educational Fund (see supra, p. 14).[30] MCA and Union liability for JAC discrimination is therefore based on principles applicable to joint management-labor trust funds in this Circuit. In Local 138, International Union of Operating Engineers v. NLRB, 321 F.2d 130 (2d Cir. 1963), the Second Circuit considered the liability of a union and a contractors' association for the acts of their trustees in the management of a welfare fund. In that case, the union appointed four members of the board of trustees, the contractors' association appointed three members of the board, and a third contractors' association (not a respondent in the NLRB proceeding, see 321 F.2d at 133, fn. 2) appointed the eight member of the board. 321 F.2d at 137. The Court affirmed the finding by the NLRB that the Fund and its trustees were agents of the union and the respondent contractors' association and that, therefore, they, as well as the Fund and its trustees, were properly held to have violated the National Labor Relations Act. 321 F.2d at 137.

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30. Both the MCA and the Union actively participated in JAC decisions. Thus the Union representatives on the JAC were also the Union's President, Secretary-Treasurer and Business Agent (A-1192; Doc. 24, p. 2). And the MCA's Executive Secretary attended JAC meetings, was a Trustee of the Fund and took the lead in hiring the agency which administered the tests found by the district court to be discriminatory (A-480, 489 607).

This almost self-evident principle has been applied specifically in the context of discrimination in the construction industry. In United States v. Local No. 24, 364 F.Supp. 808 (D.N.J. 1973), the court held:

> "[S]ince the JAC is the representative and agent of the Essex division of [the employers' association] and of Local 52, the unlawful employment practices of the JAC subject [the employers' association] and Local 52 to liability as well." 364 F.Supp. at 830.

The importance of this principle in enforcing the clear congressional intent of Title VII is evident. In recognition of this one court has held that:

> "For the purposes of the Civil Rights Acts, [the JAC] is merely the alter ego of the Defendant, Local 19, and the Defendant, Contractors' Association for purposes of making decisions concerning admission to the Union. Formal compartmentalization cannot be allowed to narrow the scope of inquiry in Civil Rights litigation, or to insulate discriminatory conduct otherwise properly challenged from the reach of relief." Williams v. Sheet Metal Workers, Local 19, 5 E.P.D. ¶8595 at 7747 (E.D. Pa. 1973).

The MCA and the Union may not control and actively participate in the affairs of the JAC, and then when the apprenticeship program is shown to be discriminatory, seek to be absolved from responsibility for its acts.

3. The District Court Erred in Establishing Certain Standards Governing the Back Pay Award

A. A Reduction of the Back Pay Awards Would Frustrate the Purposes of Title VII and Yield an Inequitable Result.

The district court provided that after the determination of all back pay claims, upon application of the Union and for good cause shown, the court might make a pro rata reduction of the back pay awards or provide for payments in installments based on the impact which back pay would have on the resources of the Union (A-779-80 [Order]), adverting to the Union's allegedly weakened financial situation. This provision conflicts with the applicable legal standards and would lead to an inequitable result.

Albemarle Paper Co. v. Moody, supra, 422 U.S. at 421, held that back pay should not be denied for reasons which if applied generally would frustrate the central statutory purposes of eradicating discrimination and making the victims of discrimination whole. Back pay was as integrally related to the former as it was to the latter. Defendants would have no incentive to cease their discriminatory practices if they believed they could plead poverty as a defense to a back pay claim, or that they would only have to pay part of a claim if they could convince a court that they were, unlike large companies, of modest means. The Fourth Circuit recently considered just such a defense and rejected it stating:

> "Local 192 also argues that it would be inequitable to assess it for back pay because it is a non-profit organization with meager assets . . . . This argument rests on the faulty premise that back pay awards are only compensatory . . . . In addition to compensating employees who have been wronged, the 'reasonably certain prospect' of a back pay award is designed to induce unions as well as employers to voluntarily eliminate unfair labor practices." Russell v. American Tobacco Co., ___ F.2d ___, 10 E.P.D. ¶10,412 (4th Cir. 1975).

Reduction of the award would make a mockery of the second purpose of Title VII, that of making the victims of discrimination whole for the economic loss which they have suffered. The victims of discrimination would be subsidizing those who discriminated against them. Whatever claims of financial exigency the Union may make, the real financial plight is that of the black and Spanish-surnamed workers who were denied equal employment opportunity by the defendants during the boom times and now are the hardest hit by unemployment (A-1207-8). The equities lie with them. Numerous cases have held unions liable for back pay and in none was the amount owed reduced at the expense of the victims of discrimination. Russell v. American Tobacco Co., ___ F.2d ___, 10 E.P.D. ¶10,412 (4th Cir. 1975); United States v. United States Steel Co., 520 F.2d 1043 (5th Cir. 1975); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Bricklayers, Local No. 1, 5 E.P.D. ¶8480 (W.D. Tenn. 1973), aff'd and mod. on other grounds sub nom., United States v. Masonry

Contractors Assoc. of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974); Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971).

Finally, the Union in this case has acted in bad faith and has no claim to equity. In granting a preliminary injunction in the United States case, the district court found that the Union had in the past discriminated against non-whites in admission to the A branch (A-158 [Findings of Fact and Conclusions of Law, ¶6]), and had violated Title VII by denial of membership in the A branch to 169 qualified minority workers because of their race and national origin (A-160-62 [Findings of Fact and Conclusions of Law, ¶¶23-35]). In the period between this finding and the date of trial, the Union continued its discriminatory practice, admitting to the A branch 156 whites who had neither completed the apprenticeship program nor taken either a written or practical examination, while the only non-whites admitted during this period resulted from the earlier order of the court (A-599 [Trial Opinion]). Thus the district court found that the Union's discriminatory practices had continued even after the preliminary injunction was issued and up to the time of Trial (A-600-01 [Trial Opinion]). The Union's continuation of its discriminatory practice, even after the decision on the preliminary injunction found it to be illegal, places the Union squarely in the position of bad faith described in Moody:

> "Where an employer has shown bad faith -- by maintaining a practice which he knew to be illegal or of highly questionable legality -- he can make no claims whatsoever on the Chancellor's conscience." 422 U.S. at 422.

Consideration of the Union's finances as a ground for reducing an award of back pay is inappropriate in any event. Where the Union has acted in bad faith, it has no basis whatsoever for such appeals.

B. The District Court Erred in Applying a Two Year Statute of Limitation to this Action, and Chose an Incorrect Date from Which to Calculate Its Running

The district court provided that back pay liability would accrue only from a date two years prior to the filing of the EEOC charge by the Rios plaintiffs, adopting a two-year limitation on back pay liability established by the 1972 amendments to Title VII (A-774 [Opinion]). However, when this action was filed there was no such limitation and courts have held that the 1972 provision does not apply to actions filed prior to the effective date of the 1972 amendments to Title VII. See United States v. Georgia Power Co., 474 F.2d 906, 922, n.21 (5th Cir. 1973); Cooper v. Philip Morris, Inc., 464 F.2d 9, 12 (6th Cir. 1972). Consequently, it is state law that provides the applicable statute of limitations. See Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971); Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), cert. granted, 95 S.Ct. 1421 (1975); United States v.

Masonry Contractors' Ass'n of Memphis, Inc., 497 F.2d 871, 876-877 (6th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, 491 F.2d 1364 (5th Cir. 1974); Pettway v. American Cast-Iron Pipe Co., 494 F.2d 211, 255 n.130 (5th Cir. 1974); and United States v. Georgia Power Co., 474 F.2d 906, 923 (5th Cir. 1973); cf. 42 U.S.C. §1988.

In this Circuit the appropriate New York State statute of limitations, where federal statutory cases of action are concerned, has been repeatedly held to be the state statute applicable to liabilities created by statute, which in New York is now New York C.P.L.R. §214. Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973), cert. denied, 414 U.S. 872 (1973); Swan v. Board of Higher Education of City of New York, 319 F.2d 56 (2d Cir. 1963). Each of these cases applied a state statute of limitations relating to statutory causes of action to a 42 U.S.C. §1983 civil rights action. This action is a statutory claim, under two civil rights acts, Title VII and 42 U.S.C. §1981. Therefore the applicable state statute is New York C.P.L.R. §214 which provides:

> "The following actions must be commenced within three years:
>
> "2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215 . . . ."

As to how far back in time back pay claims should be recognized, the appropriate reference point is the date of the

filing of the first State Division of Human Rights charges by the private plaintiffs, August 19, 1970 (A-826-27, 833-4), since at that point in time the statute of limitations was tolled. Title VII specifically requires that charges may not be filed with the EEOC until the state agency, if one exists, has had at least sixty days to consider the charge. 42 U.S.C. §2000e-5(c). It has been repeatedly held that even the invocation of union grievance procedures tolls the limitation on the time for filing with the EEOC. Malone v. North American Rockwell Corp., 457 F.2d 779, 781 (9th Cir. 1972); Hutchings v. United States Industries, Inc., 428 F.2d 303, 308-309 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970). Clearly, a complainant who files with the government agency to which Title VII directs him, i.e., the state or local agency, should be accorded at least the same protection with regard to the statute of limitations.

Applying the three-year statute of limitations of C.P.L.R. §214 would mean that an individual discriminated against between August 18, 1967 and June 21, 1973 would recover for any back pay lost during that period as a result of discrimination. Under New York law such a person had a viable cause of action during that period of time.

Finally, the district court provided that for purposes of calculating back pay, discrimination would be deemed to begin on the date that the first white applicant for membership was

admitted into the A branch after the non-white seeking to show discrimination applied for membership (A-778 [Order]). However, this is a completely arbitrary date beyond the control of the non-white and subject to the caprice of the Union and the inclinations of the white person in question.

In the context of class discrimination, everyone who was denied membership or employment during the period of discrimination should be deemed to have been victimized by discrimination on the date of denial. The district court found that the Union had engaged in a continuing pattern and practice of discrimination (A-601). As to any non-white who applied after July 2, 1965, discrimination should be presumed to have occurred on the date of application and continued to the date of the June 21, 1973 decree of the district court. It is entirely proper to presume that non-whites denied membership and employment during the period in which a pattern and practice of discrimination is continuing were denied membership or employment because of the pattern and practice.

C. Public Assistance Should Not Be Deducted From Back Pay Awarded

By the terms of the district court's Order "public assitance" is to be deducted from any back pay awarded (A-778 [Order]). Title VII itself provides that

> "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. §2000e-5(g) (emphasis added)

However, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and prior Supreme Court decisions make it clear that unemployment compensation benefits are not "earnings" properly deductable from back pay awards.

In Moody, 422 U.S. at 405 n.11 (1975), the Supreme Court said that "[t]he framers of Title VII stated that they were using the NLRA (National Labor Relations Act) as a model." The NLRB has long held that unemployment insurance benefits are not interim earnings which must be deducted from back pay awards. Marshall Field & Company v. National Labor Relations Board, 318 U.S. 253, 255 (1943) (per curiam); Yoma Woodcraft, Inc. dba Cal-Pacific Furniture Manufacturing Company and Furniture Union Local 500, Upholsterers' International Union, AFL-CIO, 221 NLRB No. 216 (December 23, 1975).

In NLRB v. Gullett Gin Co., 340 U.S. 361, 362 (1951) the sole issue on appeal was "whether the National Labor Relations Board must deduct from back pay awards to discriminatorily discharged employees sums paid to them as unemployment compensation by a state agency." The Supreme Court held that the "Board had the power to enter the order refusing to deduct the unemployment compensation payments from back pay, and that in so doing the Board did not abuse its discretion." Gullett, 340 U.S. at 364. The Court's explanation for its action was that unemployment compensation benefits were collateral benefits which the employees had received. The Court further explained that by its decision

employees would not necessarily receive a windfall since states are free to recoup benefits paid during a period covered by a back pay award. Gullett, 340 U.S. at 365.[31] There is no reason to treat other tax-supported public assistance any differently. Why should defendants reap the benefit of payments designed to help people while they are unemployed, when it was defendants' discriminatory practices that caused their unemployment?

To hold the contrary would be to provide a windfall for the discriminating defendant. The knowledge that other employers and the taxpayers would be relieving the defendant of some back pay liability would provide a further incentive to disregard the mandate of Title VII. See Moody, 422 U.S. at 2371. Moreover, it is an affront to the national policy against discrimination for the public to be paying for part of the liability of a party which has discriminated in violation of federal law.

D. Residence Within the Union's Jurisdiction at the Time of Application to the A Branch Should Not Be Required for Back Pay Eligibility

The district court's order provided that residence in a county within the Union's jurisdiction at the time of application to the A branch was a condition of back pay eligibility (A-778 [Order]). However, during the relevant period,

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31. See also, Nash v. Florida Industrial Comm., 389 U.S. 235, 239, n.4 (1967).

there was no such residence requirement for admission of qualified journeymen directly into A branch.[32] Conditioning back pay eligibility of non-white journeymen on residence within the Union's jurisdiction is simply mistaken, without relation to the facts of the case, and imposes on non-white journeymen a requirement to which whites were not subject.

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32. Membership requirements were five years experience working in the plumbing and pipefitting industry and good moral character (A-590 [Trial Opinion]).

IV. CONCLUSION

For the foregoing reasons, the decision of the District Court denying back pay should be reversed.

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Respectfully submitted,

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